Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1995

SAMUEL ANDRISANI, PETITIONER,

VERSUS

WISOT, ET. AL.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

I. Are conflicting judgments or orders in a case consistent with Equal Protection of the law?

II. Is a judgment contrary to laws consistent with Equal Protection of the law?

III. Are federal courts mandated by the United States Constitution to protect the constitutional rights of citizens against the constitutional violations committed by states?

IV. Are judges empowered by the United States Constitution to make decisions in civil and criminal cases?

V. Is the judge-attorney relationship a disadvantage to the public seeking malpractice relief against attorneys?

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SAMUEL ANDRISANI, PETITIONER

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Petition for a WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Samuel Andrisani, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on December 6, 1994.

OPINION BELOW

The decisions rendered by the Ninth Circuit Court, the United States District Court (central district), the California Court of Appeals, and the Superior Courts appear in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995 (Appendix page 3). The court of appeals denied a petition for rehearing on February 2, 1995 (Appendix page 2).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourteenth Amendment: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

2. Article III, Section 2 (3): Trial of

Crimes: The trial of all crimes...shall be by jury (not judges).

3. Amendment VII: Trial of Civil Actions: The trial of all civil actions shall be by jury (not by judges).

4. Article III, Section 3 (1): Treason: Treason against the United States is giving aid and comfort to its enemies--judges and non-judges who violate constitutional rights.

5. Article VI (3): Oath of Office: "The....judicial officers, both of the United States and of the several states, shall be bound by oath...to support the Constitution..."

STATUTES INVOLVED

1. 42 U.S.C.S. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. 28 U.S.C.S. Section 1331: The district courts shall have original jurisdiction of all civil actions arising under the Constitution.

STATEMENT OF FACTS

Petitioner Samuel Andrisani enlisted Attorney Rubino to represent Andrisani who was being sued for alleged contract violation when Andrisani leased land to a Ben Brown for grazing purposes.

Attorney Rubino accepted the case and said the case would be easy to win. Rubino took the retainer fee and then said the case would not be easy to win. Andrisani hired another attorney who easily won the case.

Andrisani requested that Rubino return the

retainer fee and Rubino refused. Andrisani sued Rubino for malpractice. The judge in the malpractice case said that because Andrisani did not call an expert witness, Andrisani lost the malpractice case. Andrisani claimed the facts were "obvious" and no expert was needed.

Rubino then sued Andrisani for malicious prosecution. Rubino had to prove three necessary elements to win: (1) favorable decision (2) no probable cause, and (3) malice (Book of Approved Jury Instructions: BAJI 6.92).

Wisot, the malicious prosecution case judge, twisted the facts so that Rubino could claim he had the three necessary elements for malicious prosecution.

Judge Wisot disregarded the decision of the malpractice case judge (Turner) who claimed the decision was technical and not "favorable"-- because no expert was called, Judge Turner ruled against Andrisani (Appendix page 29).

Judge Wisot claimed the extraneous remark in a cost memorandum motion of "no probable cause" was valid. The court of appeal stated that the extraneous remark regarding no probable cause was invalid (Appendix page 11).

Judge Wisot interpreted the jury verdict in the malicious prosecution case wherein the jury stated "no award of punitive damages" and no mention of "malice" to mean there was "malice." (Appendix page 30).

The court of appeal judges in the malicious prosecution case (Appendix page 15) agreed with Judge Wisot despite the fact that the three necessary elements to prove malicious prosecution were absent.

Since the Bar Associations report numerous malpractice cases against attorneys--few go to trial and few if any are won by the public. Judges and attorneys have formed an alliance against the public, therefore, attorney malpractice is mushrooming.

The United States District Court (Appendix page 6) and the Ninth Circuit Court of Appeal (Appendix page 3) claim the federal courts cannot reverse unconstitutional decisions of state courts. And, they claim that judges involved in unconstitutional cases (treason--a crime) are immune from the crime of constitutional violation.

REASONS FOR GRANTING THE PETITION

The petition should be granted because there are conflicting judgments in this case (Necessary Elements for Malicious Prosecution: (1) Malpractic Superior Court case says the decision is "technical"; the Malicious Prosecution Superior Court case says the decision is "favorable"; (2) Judge Wisot says there is "no probable cause", and the Court of Appeals says there is malice and the jury verdict says there is no malice.

The judgment in this case is contrary to law: (1) the law demands that the three elements

for malicious prosecution be present. They are not. (2) The Constitution demands that a citizen be given equal protection of the laws. Petitioner is denied this protection. (3) The Constitution mandates that no judge make a decision in a criminal case or a civil case. Trial of Crimes by juries not judges (Article III, Section 2 (3); Trial of civil actions by juries not judges (Amendment VII, United States Constitution). The United States Constitution makes it clear that no judge is to render a decision in any case (trial courts and appeal courts)—only juries may render decisions at the trial and appeal court level. It is constitutionally illegal for a judge to dismiss a case; to render summary judgments or make evidentiary or other important decisions prior to trial. The petitioner demands all decisions made by judges in both the malpractice and the malicious prosecution case be discarded as unconstitutional empowerment. (Voluntary requests for judge rulings

is illegal).

The Fourteenth Amendment and 42 U.S.C.S. Section 1983 and 28 U.S.C.S. Section 1331 demand that the federal courts protect the American citizen against unconstitutional decisions rendered by state courts.

The judge-attorney relationship is so allied that most often the public cannot win malpractice cases against attorneys and if they attempt to do so (as the petitioner did), the attorney in alliance with the judge win against the public in a malicious prosecution case. If the judge is not allowed to make decisions (only juries are constitutionally empowered to render judgments), then the public could prevail against bad attorneys. Presently, every Bar Association is swamped with complaints against attorneys because of this judge-attorney corruption alliance.

The Rodney King Excessive Beating Case went from the state court to the federal court contrary to the U.S.D.C. and 9th Circuit Court claim

they cannot review state court decisions. The federal court in this case reversed the state court decision.

The U.S.D.C. and the 9th Circuit Court claim judges are immune from unconstitutional decisions. An unconstitutional decision is a crime. It is treason. Judges and other officials are not immune from criminal acts. (Nixon V. Administrator of General Services, Et. Al. 33 U.S. 425).

CONCLUSION

Conflicting judgments and judgments contrary to law demand the petition be granted. Federal courts must reverse unconstitutional state court decisions or the Constitution becomes meaningless. The Constitution demands only jury decisions--all judgments or orders made by judges are constitutionally illegal. The public could successfully sue attorneys if judges were disempowered as the United States Constitution mandates.

April 27, 1995 Samuel Andrisani

APPENDIX

1. Ninth Circuit Court Order Denying Petition for Rehearing Page A 2

2. Ninth Circuit Court Judgment Page A 4

3. United States District Court Judgment Page A 7

4. California State Court of Appeal Judgment Regarding Probable Cause Motion Page A 9

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	FILED
SAMUEL ANDRISANI Plaintiff-Appellant, v. G. KEITH WISCOT, Los Angeles Superior Court Judge; ROBERT R. DEVICH: VAINO SPENCER, Justice; MIRIAM A. VOGEL, State of California Judge, et. al. Defendants-Appellees.	FEB - 2 1995 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS No. 94-55282 DC# CV-92-02626-WMB O R D E R

Before: CHOY, SKOPIL, and FERGUSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied

and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL ANDRISANI Plaintiff-Appellant, v. G. KEITH WISCOT, Los Angeles Superior Court Judge; ROBERT R. DEVICH: VAINO SPENCER, Justice; MIRIAM A. VOGEL, State of California Judge, et. al. Defendants-Appellees.	FILED DEC 06 1994 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS No. 94-55282 D.C. No. CV-92-02626-WMB Central District of California MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., Presiding

Submitted October 20, 1994**

Before: CHOY, SKOPIL, and FERGUSON, Circuit Judges.

Samuel Andrisani appeals pro se the district court's dismissal of his 42 U.S.C. 1983 action for lack of subject matter jurisdiction. Andrisani contends the district court had original

jurisdiction over his civil rights action. We affirm the district court's judgment.

We review the existence of subject matter jurisdiction de novo. Allah v. Superior Court, 871 F.2d 887, 890 (9th Cir. 1989).

Following an adverse state court judgment in a malicious prosecution suit, Andrisani appealed to the state appellate court. The appellate court affirmed the judgment against Andrisani and the California Supreme Court denied his petition for review. Andrisani then filed this action in the federal district court for the Central District of California under 42 U.S.C. 1983, alleging that the defendant attorneys and judges violated his right to equal protection in the malicious prosecution suit and subsequent appeals. Andrisani's complaint requested that "the judges be reversed in their decision," and sought declaratory relief against the judicial defendants and damages against the attorney defendants.

Federal district courts have no authority to review the final determinations of a state court in judicial proceedings. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983): Allah, 871 F.2d at 890-91; Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir. 1986). This is true even if the challenge to a state court decision involves federal constitutional issues. Worldwide Church of God, 805 F.2d at 891. As Andrisani's section 1983 claims amount to nothing more than a collateral attack on prior state court decisions, the district court correctly dismissed the complaint for lack of jurisdiction. MacKay v. Pfeil, 827 F.2d 540, 543 (9th Cir. 1987) (per curiam).

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34 (a), Ninth Circuit Rule 34-4.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAMUEL ANDRISANI,	) No. CV 92-2626WMB(GHK)
Plaintiff,	) ORDER ADOPTING
vs.	) FINDINGS, CONCLUSIONS,
G. KEITH WISCOT, et. al.,	) AND RECOMMENDATIONS
Defendants.	) OF UNITED STATES
	) MAGISTRATE JUDGE

Pursuant to 28 U.S.C. 636, the court has reviewed the complaint, all of the records and files herein, and the attached Report and Recommendations of the Magistrate Judge. The court, having conducted a de novo review of the Magistrate Judge's Report and Recommendation to which objections were interposed, approves and adopts the Magistrate Judge's findings, conclusions, and recommendations.

IT IS HEREBY ORDERED that this court has no subject matter jurisdiction; and

IT IS HEREBY ORDERED that the motion to dismiss filed by the California Supreme Court, Chief Justice Lucas, and the Associate Judges (en banc) is GRANTED, without leave to amend, for lack of subject matter jurisdiction;

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Judgment, and the Magistrate Judge's Report and Recommendation herein by United States mail on the plaintiff and on counsel for defendants.

DATED: This _____day of_____, 199__.

_____
WILLIAM MATTHEW BYRNE, JR.
United States District Judge

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SAMUEL ANDRISANI, Plaintiff and Appellant, v. SAMUEL N. RUBINO, Defendant and Respondent.	B047004 (Super. Ct. No. C 580359) COURT OF APPEAL - SECOND DISTRICT F I L E D DEC 24 1991 ROBERT N. WILSON Clerk Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Paul Turner, Judge. Affirmed.

Samuel Andrisani, In Propria Persona, for Plaintiff and Appellant.

Jay R. Saltsman for Defendant and Repsondent.

Plaintiff and appellant Samuel Andrisani (Andrisani) appeals from the order granting the motion of defendant and respondent Samuel Rubino (Rubino) to strike Andrisani's memorandum of costs and imposing sanctions. We affirm the order.

FACTS

Andrisani sued Rubino for legal malpractice, and Rubino filed a cross-complaint for fraud and breach of contract. On April 28, 1989, judgment was entered on the second amended complaint in favor of defendant Rubino and against plaintiff Andrisani, Rubino to recover his costs. Rubino's cross-complaint was dismissed without prejudice and without objection by Andrisani.

On September 29, 1989, Andrisani filed a memorandum of costs in the amount of $631.00 in connection with the cross-complaint. Rubino filed a motion to strike the memorandum of costs, and for sanctions, on the ground that Rubino, rather than Andrisani, was the prevailing party,

and the memorandum of costs was frivolous.

On October 26, 1989, the motion to strike the memorandum of costs was granted, and sanctions were imposed in the sum of $899.00.

CONTENTIONS

Insofar as we can discern from his brief, Andrisani contends (1) he was the prevailing party on the dismissed cross-complaint, and therefore entitled to sanctions in connection therewith; (2) certain language employed by the trial judge, as reflected in the minute order of October 26, 1989, suggests the court thereby modified its judgment entered April 28, 1989; and (3) the sanctions imposed improper and excessive.

Rubino requests sanctions on appeal.

DISCUSSION

The Memorandum of Costs Was Properly Stricken

"'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those

plaintiffs who do not receover any relief against that defendant." (Code Civ. Proc., 1032, subd. (a) (4); emphasis added.) "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., 1032, subd. (b).)

In the underlying case, judgment was entered in favor of defendant Rubino, who recovered his costs, and whose cross-complaint was dismissed. Rubino was the Prevailing party.

The Judgment Was Not Modified

The following comments by the trial court appear in the minutes of October 26, 1989: "The filing of a cost memorandum by a non-prevailing party is frivolous and is designed solely to annoy, harass, and otherwise vex the defendant. This is part and parcel of the filing of a suit by Andrisani which was done without probable cause and for malicious purposes." Andrisani questions whether the court's statement

that his suit was filed "without probable cause and for malicious purposes" constitutes a modification of the earlier judgment in the underlying action. It does not.

The Sanctions Imposed Were Proper and Not Excessive

Andrisani apparently questions both the propriety and amount of the sanctions imposed by the trial court. In light of the language of Code of Civil Procedure section 1032, the sanctions order was clearly proper. The amount of sanctions imposed was based on the declaration of opposing counsel setting forth his time spent in preparing the motion to strike the memorandum of costs, and the time he anticipated spending at the hearing on the motion, together with his billing rate and incidental costs. Andrisani fails to specify which of the items he considers excessive. We find no abuse of the trial court's discretion in determining the amount of the award.

An Award of Sanctions is Appropriate On This Appeal

"When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (Code Civ. Proc., 907).

Andrisani contends his appeal is not frivolous because the trial court's order granting Rubino's motion to strike his memorandum of costs contained language modifying the underlying judgment to his detriment. His claim is based upon the finding of the court in Rubino's subsequent malicious prosecution action that, "based upon the October 26, 1989 findings of Judge Turner ... there was no probable cause for the filing of the lawsuit" for legal malpractice.

As we stated above, the court's findings in connection with the motion to strike Andrisani's memorandum of costs do not constitute a modification of the judgment entered in favor of Rubino in the legal malpractice action.

Rubino's request for sanctions below raised the question whether the memorandum of costs was frivolous; answering this question, the court found the memorandum was part of a continuing course of frivolity including the filing of the lawsuit itself. Andrisani does not challenge the substance of this finding.

"(A)n appeal should be held to be frivolous only when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit. (Citation.) (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650.) The instant appeal falls into the latter category. No reasonable person could in good faith believe this appeal to have any merit whatsoever. The statutory language wasclearly against Andrisani's position on costs, and the remaining contentions are equally meritless. An award of sanctions is

appropriate.

We find that this appeal is totally without merit and was taken for the purpose of delay and deliberately and willfully to exploit the judicial process in a mean and unjust manner in order to vex and harass the respondent. We find it appropriate to impose the monetary sanction of $1,000.00 against Andrisani, to be added to the costs of this appeal.

DECISION

A monetary sanction of $1,000.00 is imposed against Andrisani and is added to the costs on appeal, and costs on appeal are awarded to respondent Rubino. The order appealed from is affirmed.

NOT FOR PUBLICATION

DANIELSON, J.

We concur:

KLEIN, P.J. HINZ, J.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SAMUEL N. RUBINO, Plaintiff, Cross-defendant, and Respondent, v. SAMUEL ANDRISANI, Defendant, Cross-complainant, and Appellant.	B048203 (Super. Ct. No. C726559) COURT OF APPEAL-SECOND DISTRICT FILED JAN 31 1992 Joseph A. Lane Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, G. Keith Wisot.

Samuel Andrisani, in pro. per., for Defendant, Cross-complainant, and Appellant.

Law Offices of Jay R. Saltsman and Jay R. Saltsman for Plaintiff, Cross-defendant, and Respondent.

Defendant Samuel Andrisani appeals from the judgment entered against him in the malicious prosecution action brought by plaintiff Samuel Rubino. We affirm.

BACKGROUND

The Legal Malpractice Action

On a date not revealed by the record on appeal, Andrisani hired Rubino to serve as his attorney in an action filed against him (hereafter "the initial action"). Andrisani subsequently discharged Rubino and, on December 23, 1985, filed a complaint against Rubino for legal malpractice [Andrisani v. Rubino (Super. Ct. L.A. County, 1985, No. C 580359), hereafter "the underlying action"].

On April 28, 1989, following a court trial, the trial court in the underlying action ruled in favor of Rubino. On the same date, a cross-complaint, filed by Rubino in the underlying action but not contained in the record on appeal, was "dismissed without prejudice without

objection by (Andrisani)." A judgment was entered September 20, 1989.

Andrisani filed a motion to vacate the judgment in the underlying action, which was denied on May 26, 1989. On July 19, 1989, Andrisani filed a notice of appeal from this order.

After losing the underlying action, Andrisani filed a memorandum of costs. Rubino filed a motion to strike the memorandum of costs and requested sanctions. On October 26, 1989, the trial court granted Rubino's motion and imposed sanctions (hereafter "the sanctions order"), finding, "The filing of a cost memorandum by a non-prevailing party is frivilous (sic) and is designed solely to annoy, harrass (sic), and otherwise vex the defendant. This is part and parcel of the filing of a suit by Andrisani which was done without probable cause and for malicious purposes(.)" Andrisani filed a notice of appeal from the sanctions order on December 11, 1989.

The Malicious Prosecution Action

On June 6, 1989, Rubino filed the instant malicious prosecution action against Andrisani.

On August 28, 1989, Andrisani filed a cross-complaint captioned, "Damages for Fallacious Malicious Prosecution Lawsuit."

Relying on the finding in the sanctions order that Andrisani filed the underlying action without probable cause, the trial court instructed the jury in the malicious prosecution action that "(t)here was no probable cause for the commencement or the maintenance of the civil proceeding, that is the underlying legal malpractice action."

On December 8, 1989, the jury returned a verdict in favor of Rubino, awarding $10,000.00 in compensatory damages, but denying punitive damages.

On December 15, 1989, Andrisani filed a motion for new trial, supported by points and authorities. Supplemental points and authorities

were filed by Andrisani on December 22, 1989, January 12, 17, 24, and 29, 1990. On January 30, 1990, the trial court denied the motion for new trial and granted Rubino's request for sanctions based on the "failure of (Andrisani) to comply with Section 659 of the Code of Civil Procedure and the multiplicity of documents filed and the late filing of documents."

ISSUES[1]

On appeal, Andrisani contends (1) the underlying action was terminated on "technical grounds" and therefore does not support a malicious prosecution judgment; (2) the trial court's denial of summary judgment in the underlying action indicates there was probable cause to file the action; (3) the trial court improperly relied

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1 Within the confines of a six-page opening brief, Andrisani has managed to list 10 purported issues. Andrisani's explanation of the basis of and legal support for each issue is minimal. Our discussion of each issue will be equally brief.

on an earlier finding of no probable cause since the sanctions order which contained this finding was not final; (4) the malicious prosecution action constitutes double jeopardy; (5) the compensatory damages award is not supported by the evidence; (6) a verdict for malicious prosecution is improper since the jury declined to award punitive damages; (7) the trial court improperly dismissed Andrisani's croo-complaint to the malicious prosecution action; (8) since "(t)he verdict did not mention malice and awarded zero punitive damages (, i)t cannot be assumed that the compensatory damages included damages for malice"; (9) "(t)he sanctions imposed by (the trial court) are unfair and should be reversed"; and (10) the trial court improperly excluded evidence of the verdict in the initial action (in which Rubino served as counsel).

DISCUSSION

1. Favorable Termination

Andrisani asserts that he lost the underlying action because he failed to produce ex-

pert witness testimony. Characterizing Rubino's victory in the underlying action a decision "based on technical grounds," Andrisani contends the judgment in the underlying action cannot support a malicious prosecution judgment.

While it is true that, in order to support a malicious prosecution action, the favorable termination of the earlier action must reflect on the merits (Lackner v LaCroix (1979) 25 Cal.3d 747, 750), a plaintiff's failure to meet his burden of proof clearly demonstrates the action to be without merit. [Jaffe v. Stone (1941) 18 Cal.2d 146, 151.]

2. Effect of Denial of Summary Judgment in the Underlying Action

Andrisani argues that by denying Rubino's motion for summary judgment in the underlying action and therefore "approving a trial for malpractice," there was a binding judicial determination that probable cause to file the underlying action existed.

Andrisani misconstrues the nature of Rubino's summary judgment motion in the underlying action. This motion was premised on the alleged absence of causation and damages, both of which are necessary elements of a cause of action for negligence. In ruling on such a motion, a trial court merely determines whether triable issues of material fact exist. If such issues exist, the trial court must deny the motion. [Code Civ. Proc., 437c, subd. (c).]

3. Binding Effect of Earlier Probable Cause Finding

In the instant action, the trial court based its determination that there was no probable cause for filing the underlying action on the text of the sanctions order.

Andrisani contends that it was improper to rely on the earlier finding since (a) "(the trial court which imposed the sanctions) was merely making 'unofficial remarks' in (the sanctions order). If (that trial court) intended to

alter the judgment (it) would have filed an official document for that purpose," and (b) the order had not yet become final since the period of appeal was still running.

As to the first point, the earlier finding was part of a minute order duly entered in the record and was therefore sufficiently "official."

As to the second point, we initially note that Andrisani failed to object to the trial court's reliance on the earlier finding on the basis of finality, and has therefore waived any such objection. (Cf. Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal.3d 967, 977; see also Dimmick v. Dimmick (1962) 58 Cal.2d 417, 422.) Moreover, since the sanctions order was affirmed on appeal [Andrisani v. Rubino (Dec. 24, 1991) B047004 (nonpub. opn.)], any error by the trial court in relying on this order was harmless.

4. Double Jeopardy

Andrisani asserts that "(i)f the (sanctions order is deemed valid by the appeal court

then the malicious prosecution trial is double jeopardy." The prohibition against double jeopardy contained in the United States and California Constitutions (U.S. Const., 5th Amend.; Cal. Const., art. I, 15, cl. 5) applies only to criminal proceedings. Both the underlying action and the malicious prosecution action are civil proceedings.

5. Insufficiency of the Evidence/Improper Jury Instructions

Andrisani complains that, since the jury neither heard evidence on the probable cause issue nor was instructed on the definition of probable cause, it had "no grounds to award compensatory damages." "(T)he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury." (Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 875.) Accordingly, the trial court properly refrained from defining

probable cause for the jury.

Andrisani further asserts that "the court failed to give the jury instruction that the jury must see evidence of invoices for compensatory damages (BAJI 14.62)." Initially, we note that BAJI No. 14.62 has nothing to do with invoices.[2] Furthermore, Andrisani cannot complain on appeal that this type of an instruction was not given since he did not request such an instruction.

6. Malice

Andrisani argues that by failing to award punitive damages against him, the jury impliedly found an absence of malice thereby negating an essential element of a malicious prosecution action. Andrisani's premise is faulty since, in order to recover punitive damages, Rubino had

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[2] BAJI No. 14.62 provides: "The amount of damages claimed, either by the written pleadings or in the argument of counsel, must not be considered by you as evidence of reasonable compensation."

the burden of proving either malice or oppression by clear and convincing evidence. To recover for malicious prosecution, Rubino had to meet a lower burden of proof (i.e., by a preponderance of the evidence). [BAJI Nos. 7.32, 14.71; Civ. Code, 3294, subd. (A).]

7. Andrisani's Cross-complaint

Andrisani asserts the trial court improperly dismissed the cross-complaint he filed in the malicious prosecution action. Although the record on appeal is sparse with regard to this issue, it contains a copy of Andrisani's cross-complaint, filed August 29, 1989, captioned "Damages for Fallacious Malicious Prosecution Lawsuit," as well as the trial court's December 6, 1989 order denying Andrisani's motion to reinstate the cross-complaint.[3] Relying on various cases which hold that a voluntary dismissal without

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3 The December 6, 1989 order reveals that a judgment on the pleadings was entered on the cross-complaint.

prejudice constitutes a favorable termination of an action, thereby supporting a subsequent malicious prosecution action, Andrisani points to the dismissal without prejudice of Rubino's cross-complaint in the underlying action and contends that the "dismissal represents a favorable decision for filing a cross-complaint in the Malicious Prosecution case." Andrisani once again misses the mark. Contrary to Andrisani's argument, his cross-complaint was based on damages he allegedly sustained due to Rubino having filed a complaint for malicious prosecution, not on the dismissal of Rubino's cross-complaint in the underlying action. Accordingly, the trial court correctly ruled that Andrisani's cross-complaint, which essentially asserted a cause of action for malicious prosecution, could not be maintained unless Rubino's malicious prosecution action terminated in Andrisani's favor.

8. Defective Verdict

Andrisani contends that, since "(t)he verdict did not mention malice and awarded zero punitive damages (, i)t cannot be assumed that the compensatory damages included damages for malice."

Andrisani misconstrues the nature of a general verdict which "pronounce(s) generally upon all or any of the issues, either in favor of the plaintiff or defendant...." (Code Civ. Proc., 624.) If Andrisani had desired a special verdict, it was incumbent upon him to request one. Not having done so, he cannot now complain.

9. Propriety of Sanctions

Andrisani asserts that "(t)he sanctions imposed by (the trial court) are unfair and should be reversed." Given Andrisani's complete disregard of the requirements of Code of Civil Procedure section 659, including his having filed five separate sets of points and authorities, we conclude that Andrisani has failed to demonstrate

the trial court abused its discretion by imposing sanctions pursuant to Code of Civil Procedure section 128.5.

10. Exclusion of Evidence

Andrisani asserts the trial court improperly excluded evidence of the verdict entered in the initial action in which Rubino rendered legal services. We disagree. The caliber of Rubino's services was resolved in the underlying action. Evidence of the verdict obtained in the initial action was totally irrelevant to the issues presented by the malicious prosecution action.[4]

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[4] Rubino's request for sanctions is denied. (In re Marriage of Flaherty (1982) 31 Cal .3d 637, 650).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

DEVICH, J.

We concur:

SPENCER, P.J.

VOGEL, J.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

DATE: 05/26/89 DEPT. 62

HONORABLE PAUL TURNER JUDGE

S. BARRETT DEPUTY CLERK____

HONORABLE JUDGE PRO TEM

27

I. BRETANA, CT ASST

Deputy Sheriff C. LAMPKIN Reporter
(Parties and counsel checked if present)

NATURE OF PROCEEDINGS.

MOTION OF PLAINTIFF, SAMUEL ANDRISANI, TO CORRECT THE CLERICAL EWRROR (sic) IN THE POSTING OF PAID JURY FEES BY GRANTING A JURY TRIAL AND VOIDING THE COURT TRIAL OF OF (sic) APRIL 28, 1989.

Motion comes on for hearing and is argued. The motion is denied. First, this case involving the probable alteration of public records by persons acting on behalf of the plaintiff. The court finds as a factual matter that no clerical error has occurred and that the notations of October 17, 1988 on the register was not indicative of clerical error and a preponderance of the evidence is not a notation made by a deputy clerk of this court.

On the date of the trial, the court had the deputy clerk personally verify with the Superior Court Finance Officer whether jury fees had been posted in this case. Although all records are subject to error the finance records are the most accurate of all records maintained by the Superior Court. The clerk of Department 62 personally verified no jury fees were posted. Plaintiff gave the court certain documents claiming that they were evidence of posting of jury fees in this case.

.

Finally, the defendant's argument that even if there was an improper denial of the jury trial right that it would not have resulted in a miscarriage of justice, although eminently covert in its analysis, is not a correct statement of law. This is a professional negligence action and plaintiff must call an expert witness to establish a breach of duty of care given the nature of the alleged negligence identified in th (sic) complaint [Lysick vs. Walcom (1968) 258 Cal. App 2d 136, 156]. Plaintiff has designated no experts, and as a matter of law, the court would grant a non-suit motion at the conclusion of any opening statement to the jury. Any new trial would necessarily result in a defense judgment. However, the law is clear that the denial of a jury trial must result in a new trial [Byrom v. Superior Court (1977) 74 Cal. App 3d 648, 659]. However, given waiver that occurred in this case, the new trial motion premised upon fraudulently altered public records is denied.

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On its own motion, the court strikes the October 17, 1988 entry in this case appearing on the register.

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The defendant's motion for sanctions is granted. The present motion is frivilous (sic). It is

based on deliberately and fraudulently altered public documents.

FILED
DEC 08 1989

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Samuel Rubino
Plaintiff(s)

Case Number
C 726 559

vs.

Samuel Andrisani, et al
Defendant(s)

JUDGMENT ON VERDICT
IN OPEN COURT

This action came on regularly on 12-12, 1989; in Department 31 of the Superior Court, the Honorable G. Keith Wisot Jeudge Presiding; the plaintiff(s) appearing by attorney(s) Jay Saltsman
and the defendant(s) appearing by attorney(s) Samuel Andrisani in pro per

A jury of ..12.. persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiff(s) and the defendant(s) were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called answered to their names and duly rendered their verdict in writing in words and figures as follows, to-wit:

TITLE OF COURT AND CAUSE "We the jury in the above entitled action, find for the .plain-..

tiff.Samuel.Rubino.and against defendant Samuel Andrisani in the following amount $10,000.00. Furthermore, we do ___ or do not_x_ assess punitive damages in the amount of __0____.

Dated December 8, 1989 Tonya Turner
Presiding Juror

(OVER)
JUDGMENT ON VERDICT IN OPEN COURT